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IN THE

Supreme Court of the United States

October Term, 1947.

No. 462

TRANSAMERICA CORPORATION, AND ITS OFFICERS AND DIRECTORS,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

No. 463

TRANSAMERICA CORPORATION, AND ITS OFFICERS AND DIRECTORS,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

EDWIN D. STEEL, JR.,
3018 duPont Building,
Wilmington 41, Delaware,
Attorney for Petitioners.

MORRIS, STEEL, NICHOLS & ARSHT,
Of Counsel.

International, 236 Chestnut St., Phila. 6, Pa.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Transamerica Corporation, and its Officers and Directors, pray that Writs of Certiorari issue to the Circuit Court of Appeals for the Third Circuit to review final judgments of that Court entered on September 15, 1947.

OPINIONS BELOW.

The opinion of the District Court is reported in 67 F. Supp. 326, and the opinion of the Court of Appeals is reported in 163 F. (2d) 511.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (26 Stat. 828 (1891), as amended, 28 U. S. C. § 347 (a)), which is made applicable by Section 27 of the Securities Exchange Act of 1934 (48 Stat. 902 (1934), as amended, 15 U. S. C. § 78aa).

The date of the judgments sought to be reviewed is September 15, 1947, and the date upon which this Petition for Writs of Certiorari is presented is December 2, 1947.

STATUTE AND RULES INVOLVED.

The pertinent provisions of the Securities Exchange Act of 1934 (48 Stat. 881 (1934), as amended, 15 U. S. C. § 78a) are set forth in the Appendix, *infra,* pp. 17-18. The Proxy Rules (Regulation X-14) are set forth in full in the Record (R. 88-112).

STATEMENT OF THE CASE.

The Commission brought an action against Transamerica, a Delaware corporation, charging that it was violating the Proxy Rules in soliciting proxies for its 1946 annual meeting. Transamerica's solicitation made it subject to Section 14 (a) of the Act which makes it unlawful for a person "to solicit any proxy * * * in contravention of such rules and regulations as the Commission may prescribe * * *." (*infra,* p. 17). The Commission did not challenge any part of Transamerica's Proxy Statement or its soliciting procedure, except the manner in which it dealt with the proposals of stockholder Gilbert, who owned

17 shares of Transamerica's stock out of approximately 10,000,000 shares outstanding.

In January 1946 Gilbert advised Transamerica that at the annual meeting of stockholders to be held in April he intended to propose (R. 10a-13a):

(1) a By-Law amendment to permit stockholders to elect auditors.

(2) an amendment to eliminate from By-Law 47 the requirement that By-Law changes must be included in the notice of meeting before being acted upon by stockholders.

(3) a "straight resolution" (Gilbert's words), involving no by-law amendment, to require Transamerica to send to all stockholders a summary of the proceedings at stockholders' meetings.

The Commission asserted that under its Rules, if Transamerica solicited proxies for the election of directors, it must also solicit and vote its proxies on Gilbert's proposals (R. 29a, 31a).

The pertinent Rules pertaining to the duties of solicitation and to the contents of proxy statements and proxies, provide (R. 93, 89, 112):

Rule X-14A-7.

"In the event that a qualified security holder of the issuer has given the management reasonable notice that such security holder intends to present for action at a meeting of security holders of the issuer a proposal which is a proper subject for action by the security holders, the management shall set forth the proposal and provide means by which security holders can make a specification *as provided in Rule X-14A-2.* Further, if the management opposes such proposal, it shall, upon the request of such security holder, include in its soliciting material the name and address of such se-

curity holder and a statement of such security holder setting forth the reasons advanced by him in support of such proposal: * * *."[1]

Rule X-14A-2.

"Means shall be provided in the form of proxy whereby the person solicited is afforded an opportunity to specify by ballot a choice between approval or disapproval of each matter, or each group of related matters as a whole, *which is intended to be acted upon pursuant to the proxy* and the authority conferred as to each such matter or group of matters shall be limited to voting in accordance with the specifications so made. * * *"

Item 18 of Schedule 14A.

"If the persons making the solicitation are informed that any other person intends to present any matter for action at any meeting of security holders at which action pursuant to the proxy is to be taken, and *if the persons making the solicitation intend that such matter shall not be acted upon pursuant to the proxy,* make a statement to that effect, identifying the matter and indicating the disposition proposed to be made thereof at the meeting in the event the disposition thereof is within the control of the persons making the solicitation."[2]

These Rules provide, in effect, that if Transamerica intended to act on Gilbert's proposals under its proxies (which it did not), it was required to set out the proposals in its proxy statement, to give the stockholders an opportunity to specify in the proxies how they desired their stock to be voted, and if it opposed the proposals, to set out in its proxy statement Gilbert's name, address and reasons for his proposals; but if Transamerica did not intend to

(1) All italics supplied unless otherwise indicated.
(2) Item 18 is applicable to management solicitation. Rule X-14A-9(h) so provides (R. 97).

act upon Gilbert's proposals under its proxies (which was the fact), it was only required to make a statement to that effect (which it did). Rule X-14A-6 (b) recognizes that a corporation may not wish to solicit proxies upon a stockholder's proposal and provides the means whereby a stockholder may solicit his own proxies through the corporation as an intermediary (R. 93). Gilbert did not attempt to follow the procedure specified in Rule X-14A-6.

The Commission contended that the above Rules made it mandatory for Transamerica to solicit proxies on Gilbert's proposals, to vote its proxies for or against the proposals as the stockholders directed, and that Transamerica should therefore conform its soliciting material to Rules X-14A-7 and X-14A-2 (R. 29a, 31a).

Transamerica pointed out that the proposed By-Law amendments could not be validly acted upon at the meeting since the notice of meeting made no reference to the amendments, and under By-Law 47 the By-Laws could not be changed without notice.[3] It also stated that as a matter of principle it would be wrong to require the Corporation to insert in its notice any by-law amendment that any one of its 150,000 stockholders might propose (R. 35a). As to the "straight resolution", Transamerica stated that the directors, and not the stockholders, were authorized to determine whether corporate moneys should be spent to print and mail to stockholders a summary of the meeting (R. 27a, 28a). Consequently, Transamerica advised the Commission that Gilbert's proposals were not proper subjects for stockholders to act upon, and if they were presented at the meeting, they would be ruled out of order (R. 27a). Since Transamerica did not intend to act upon Gilbert's proposals under its proxies, it conformed its soliciting material to the requirements of Item 18 (R. 18a, 55a).

When Transamerica began to solicit proxies for directors, without soliciting upon Gilbert's proposals, the Com-

(3) In its brief filed in the Circuit Court of Appeals, the Commission admitted the validity of By-Law 47.

mission sought an injunction in the District Court of Delaware (Leahy, J.) against holding the meeting except for purposes of adjournment (R. 5a, 43a). Upon motion for a preliminary injunction, the Court permitted the meeting to be held for the election of directors, but ordered that the meeting thereupon be adjourned (R. 56a). Later, the Court entered a judgment (based upon the Commission's motion for summary judgment) which (i) upheld Transamerica's action regarding Gilbert's proposed amendment to By-Law 47 and his proposed "straight resolution"; (ii) directed Transamerica to mail to all stockholders (including 1300 outside the United States from whom Transamerica had solicited no proxies) a notice of an adjourned 1946 annual meeting to be held for the stated purpose of considering the auditor proposal; (iii) directed Transamerica to solicit proxies on the auditor proposal from all previously solicited stockholders and to vote such proxies at the adjourned meeting; and (iv) enjoined Transamerica from soliciting proxies "without fully complying with Section 14 (a) of the Securities Exchange Act of 1934 and Proxy Rules X-14A-7 and X-14A-2 thereunder"[4] (R. 81a).

From this judgment, cross appeals were taken to the Circuit Court of Appeals. Meanwhile, pursuant to an order of the District Court, Transamerica has been keeping its 1946 Annual Meeting open by adjourning it for successive periods of thirty days (R. 87a).

The appeals were argued on January 23, 1947. On September 15, 1947 (*after the 1947 annual meeting had been held*),[5] the Circuit Court rendered an opinion requiring Transamerica to solicit and vote proxies on all of Gilbert's

(4) This general prohibition is followed by the statement that it applies "more particularly" to proxy solicitation in connection with any proposal of a stockholder which "has to do with the election of independent auditors by the stockholders" (R. 82a). *This latter specification, however, does not restrict the sweep of the more general language which precedes it* (R. 81a).

(5) Since the case was decided by the District Court in 1946, the record does not disclose the holding of the 1947 meeting. It is believed, however, that the Court is justified in taking judicial notice that the 1947 meeting was held inasmuch as Transamerica's By-Law 4 specifies that annual meetings shall be held on the last Thursday in April in each year (R. 123).

proposals *at an adjourned 1946 meeting,* and affirming the injunctive provision of the District Court's judgment (R. 127).

QUESTIONS.

1. Does the Commission have power to adopt Rules making it mandatory for a corporation which desires to solicit proxies solely for the election of directors, likewise to solicit proxies upon proposals submitted by stockholders?

2. Do the Rules adopted by the Commission create such a duty?

3. Does the Court have power to compel Transamerica to embody reference to stockholders' proposals in a notice of meeting (not a part of a Proxy Statement) when (i) neither the Act nor the Proxy Rules contains any requirement as to the contents of notices; (ii) some of the notices are sent to stockholders from whom no proxies are solicited for any purpose; and (iii) Section 27 of the Act authorizes the Court only "to enforce any liability or duty created by this title or rules and regulations thereunder * * *"?

4. Were Gilbert's proposals "a proper subject for action" by stockholders within the meaning of Rule X-14A-7?

5. Does the judgment which broadly enjoins Transamerica from soliciting proxies in violation of Section 14 (a) of the Act and Rules X-14A-7 and X-14A-2 conflict with the principles enunciated by this Court in *National Labor Relations Board v. Express Publishing Co.,* 312 U. S. 426 (1941), and *May Department Stores Co., d. b. a. Famous-Barr Co. v. National Labor Relations Board,* 326 U. S. 376 (1945), which require that an injunction be limited to violations of the kind actually proven, or reasonably anticipated by virtue of past conduct?

6. In holding that Transamerica must resolicit proxies for an adjourned 1946 meeting, even though its 1947 meeting already has been held, has the Court departed from the

principle enunciated in *Watts, Watts & Co. v. Unione Austriaca, etc.*, 248 U. S. 9, 21 (1918), and *Public Utilities Comm'n of Ohio, et al. v. United Fuel Gas Co., et al.*, 317 U. S. 456, 466 (1943), which requires an appellate court to dispose of a case on the basis of facts which exist at the time of its decision?

REASONS FOR GRANTING THE WRIT.

1. The Circuit Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been but Should Be Settled by This Court.

The net effect of the decision of the Circuit Court is to compel a corporation which desires to solicit proxies only for directors, also to solicit proxies upon proposals submitted by stockholders. If the Rules are susceptible of this construction (and it is believed they are not), then the Rules are unauthorized by the Act, since the Act imposes no affirmative duty to solicit but simply prohibits solicitation "in contravention of such rules and regulations as the Commission may prescribe" (*infra*, p. 17). The purpose of the Act was simply to require disclosure by management concerning matters upon which the solicited proxies were to be used, not to compel solicitation.

Senate Committee Report No. 792, 73d Cong., 2d Sess. states:

> "Too often proxies are solicited *without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.* • • • The Committee recommends that the solicitation and issuance of proxies be left to regulation by the Commission."

House Committee Report No. 1383, 73d Cong., 2d Sess. states:

> "Insiders have at times solicited proxies *without fairly informing the stockholders of the purposes for*

> ***which the proxies are to be used and have used such proxies to take from the stockholders for their own selfish advantage valuable property rights.*** * * * For this reason the proposed bill gives * * * Commission power to control the conditions under which proxies may be solicited * * *."

The Commission at one time apparently recognized that under the Act it had no authority to dictate the matters to be submitted to stockholders, but that its power was limited to requiring fair disclosure as to all matters upon which proxies were to be voted. S. E. C. Release 1823, under the Securities Exchange Act of 1934 issued on August 11, 1938, states:

> "The new regulation does not prescribe in any way what matters should be submitted to a vote of security holders, but it is based upon the principle that when a question is presented to security holders for their specific action the essential information should be furnished them so far as is possible."

A further effect of the decision of the Circuit Court is to repose in the Commission the power to dictate the terms of a notice of meeting (not a part of the proxy statement) which is sent to stockholders from whom no proxies are solicited, even though the Rules neither specify what the notice must contain, nor require the notice to be filed prior to solicitation (R. 91). As to the contention of the Commission that Transamerica was under a duty *by virtue of Delaware law* to include in its notice of meeting Gilbert's proposed By-Law amendments (R. 32a-33a) (which Transamerica denies),[6] it would seem clear that neither

(6) The District Court upheld Transamerica's interpretation of the Delaware law, saying (R. 70a):

> "There is nothing in the General Corporation Law of Delaware or in the charter or by-laws of Transamerica Corporation which requires it to give stockholders notice of any by-law amendment which a shareholder desires to submit at an annual meeting."

The Circuit Court did not pass upon this point.

the Commission nor the Court has the authority to enforce a duty allegedly arising under State law, in the present proceedings. Section 27 of the Act authorizes the Court only "to enforce any liability or duty *created by this title or rules and regulations thereunder* * * *" (*infra*, p. 17).

In addition, since under the Corporation Law of Delaware (Revised Code of Delaware 1935, § 2041) and Transamerica's Charter and By-Laws (R. 49a, 50a), the management of Transamerica is vested in its directors, it would seem self-evident that the directors alone were authorized to determine whether corporate money should be expended pursuant to Gilbert's "straight resolution" which Gilbert specified was not to be in the form of a By-Law amendment (R. 13a). Yet, under the decision of the Circuit Court, the directors are to be divested of their authority to act on the straight resolution and that power is reposed in the stockholders.

Every corporation with securities listed on a national securities exchange is subject to the Proxy Rules if it solicits proxies. Manifestly, it is of great importance not only to the management and stockholders, but to the administrators of the Act as well, to have this Court definitively determine the questions presented by this Petition.

2. The Questions Presented by This Petition Are Important in the Administration of the Securities Exchange Act of 1934 and the Proxy Rules.

Petitions for certiorari appear uniformly to have been granted whenever the questions presented are important in the administration of a regulatory act.

> *Securities & Exchange Commission v. Chenery Corporation, et al.*, mem., 317 U. S. 609 (1942); 318 U. S. 80 (1943) (involving Public Utility Holding Company Act);

Otis & Co. v. Securities & Exchange Commission, et al., mem., 322 U. S. 724 (1944); 323 U. S. 624 (1945) (involving Public Utility Holding Company Act);

Securities & Exchange Commission v. C. M. Joinder Leasing Corporation, et al., mem., 318 U. S. 755 (1943); 320 U. S. 344 (1943) (involving Securities Act of 1933);

National Labor Relations Board v. Express Publishing Co., mem., 311 U. S. 638 (1940); 312 U. S. 426 (1941) (involving N. L. R. A.);

May Department Stores Co., doing business as Famous-Barr Co. v. National Labor Relations Board, mem., 324 U. S. 838 (1945); 326 U. S. 376 (1945) (involving N. L. R. A.).

The case at bar involves, *inter alia*, the scope of the injunction which has been issued against Transamerica (*infra*, p. 12) which is directly analogous to the question which caused the Court to grant certiorari in the *May Department Stores* case. The Court in the latter case said (pp. 377-378):

> "The petition for the writ presented issues • • • as to the propriety of a Board order to cease and desist generally from unfair labor practices instead of an order to cease and desist only from the type or types of unfair practices which the Board found the employer committed. As these issues presented important problems in the administration of the National Labor Relations Act, certiorari was granted 324 U. S. 838."

3. In Affirming the District Court's Judgment Which Broadly Enjoins Transamerica From Soliciting Proxies in Violation of Section 14 (a) of the Act and Rules X-14A-7 and X-14A-2, the Court Has Decided a Federal Question in a Way Probably in Conflict With the Principles Enunciated in National Labor Relations Board v. Express Publishing Co., 312 U. S. 426 (1941), and May Department Stores Co. v. National Labor Relations Board, 326 U. S. 376 (1945).

Paragraph 3 of the judgment of the District Court (affirmed by the Circuit Court of Appeals) broadly enjoins Transamerica from soliciting proxies "without complying fully with Section 14 (a) of the Securities Exchange Act of 1934 and Proxy Rules X-14A-7 and X-14A-2 thereunder * * *" (R. 82a). The sweep of the injunction, it is believed, conflicts with the principles enunciated in *National Labor Relations Board v. Express Publishing Co.*, 312 U. S. 426 (1941), and *May Department Stores Co. v. National Labor Relations Board*, 326 U. S. 376 (1945). In the *Express Publishing Co.* case, the Court held that the National Labor Relations Board was without authority under Section 10 (c) of the N. L. R. A. to order an employer to cease and desist both from refusing to bargain collectively, and from interfering with the rights of its employees guaranteed by Section 7 of the Act, when it appeared that the employer had been guilty only of the first offense.[7]

In *May Department Stores Company v. National Labor Relations Board, supra*, the Court held that (p. 392):

> "without a clear determination by the Board of an attitude of opposition to the purposes of the Act to

(7) Section 10(c) of the N. L. R. A. provides that if, after hearing "* * * the Board shall be of the opinion that any person named in the complaint has engaged in or is about to engage in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice * * *." (48 Stat. 926 (1934), as amended, 29 U. S. C. § 160(c).)

Section 10(c) of the N. L. R. A. is substantially similar to Section 21(e) of the Securities Exchange Act of 1934 (*infra*, p. 17).

> protect the rights of employees generally, the decree need not enjoin Company actions which are not determined by the Board to be so motivated"

and that the Courts called upon to enforce orders may examine their scope to see whether, on the evidence, as a matter of law they go beyond the authority of the Board.

In the case at bar, neither the District Court nor the Circuit Court found that Transamerica had adopted an attitude of general opposition to the purpose of the Act or the Rules. The pending case is the only one in which Transamerica has ever been charged with violating the Act or the Rules and the District Court held that Transamerica's interpretation of the Rules was proper as to two of Gilbert's proposals. Consequently, the question arises whether one who in good faith submits to judicial determination a substantial issue under the Proxy Rules, does so at the risk, if unsuccessful, of being found in contempt at some remote future time with regard to issues unrelated to those adjudged.

The scope of the injunction, it is believed, violates the principles enunciated by this Court in the *Express Publishing Co.* and the *May Department Stores* cases.

4. In Holding That Transamerica Must Resolicit Proxies for an Adjourned 1946 Meeting, Even Though Its 1947 Meeting Already Has Been Held, the Circuit Court of Appeals Has Decided a Federal Question in a Way Probably in Conflict With the Principles Enunciated by This Court in Watts, Watts & Co. v. Unione Austriaca, Etc., 248 U. S. 9 (1918), and Public Utilities Comm'n of Ohio, et al. v. United Fuel Gas Co., et al., 317 U. S. 256 (1943).

Between the time when the appeals were argued in the Circuit Court of Appeals and the date when the opinion was rendered by the Court, Transamerica held its 1947 meeting. Nevertheless, the Circuit Court of Appeals held

that Transamerica must resolicit proxies upon all of Gilbert's proposals for an adjourned 1946 meeting, merely to enable one person holding 17 shares of stock to present his proposals for consideration. The magnitude of this requirement is manifest for Transamerica has approximately 150,000 stockholders holding almost 10,000,000 shares of stock (R. 116-117).

In *Watts, Watts & Co. v. Unione Austriaca, etc.*, 248 U. S. 9 (1918), this Court said (p. 21):

> "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but *to make such disposition of the case as justice may at this time require.* Butler v. Eaton, 141 U. S. 240; Gulf, Colorado & Santa Fe Ry. Co. v. Dennis, 224 U. S. 503, 506. *And in determining what justice now requires the court must consider the changes in fact and in law which have supervened since the decree was entered below.* United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 239 U. S. 466, 475, 478, Berry v. Davis, 242 U. S. 468; Crozier v. Krupp, 224 U. S. 290, 302; Jones v. Montague, 194 U. S. 147; Dinsmore v. Southern Express Co., 183 U. S. 115, 120; Mills v. Green, 159 U. S. 651; The Schooner Rachel v. United States, 6 Cranch 329; United States v. The Schooner Peggy, 1 Cranch 103, 109-110."

In *Public Utilities Comm'n of Ohio, et al. v. United Fuel Gas Co., et al.*, 317 U. S. 456, 466 (1943), the Court said:

> "* * * It is the case that is here now that must be decided, and *it must be decided on the basis of the circumstances that exist now.* Cf. Vendenbark v. Owens-Illinois Co., 311 U. S. 538, 542-543, and cases there cited."

These decisions, it is believed, make it mandatory for an appellate court to take into consideration changes in

circumstances which have occurred between the date of the decision by the trial court and the time when the appellate court renders its decision. The Circuit Court of Appeals has failed to heed the admonitions of these decisions by requiring Transamerica to resolicit proxies for an adjourned 1946 meeting, even though its 1947 meeting already has been held.

The unreasonableness of this requirement is emphasized by the fact that under Delaware law the persons entitled to notice of, and to vote at, an adjourned meeting are the same persons who were entitled to vote at an original meeting. Section 17 of the General Corporation Law authorizes directors to fix a record date for determining stockholders entitled to notice of, and to vote at a meeting, and then provides that (Revised Code of Delaware 1935, § 2049):

> "* * * only such stockholders as shall be stockholders of record on the date so fixed shall be entitled to such notice of, and to vote at, such meeting *and any adjournment thereof* * * *."

A resolicitation of proxies upon Gilbert's proposals, therefore, will mean that persons who were stockholders of record on March 30, 1946 (R. 20a) will be the only persons entitled to vote at the adjourned meeting, which of necessity will be held sometime in 1948. This means that many persons who have long ceased to be stockholders will be entitled to vote, whereas numerous persons who have become stockholders in the interim will be disenfranchised. The inequity of requiring solicitation under such circumstances would appear manifest, particularly as Gilbert is free to submit his same proposals at the next annual meeting which will follow the final decision in this case. At that time Transamerica will be subject to whatever ruling is ultimately determined upon herein.

CONCLUSION.

Wherefore, the Petitioners pray that the Petition for Writs of Certiorari be granted, that the cause be reviewed, and that the judgments of the Circuit Court of Appeals for the Third Circuit be reversed.

Respectfully submitted,

EDWIN D. STEEL, JR.,
3018 duPont Building,
Wilmington 41, Delaware,
Attorney for Petitioners.

MORRIS, STEEL, NICHOLS & ARSHT,
Of Counsel.

APPENDIX.

Provisions of Securities Exchange Act of 1934.

Section 14 (*a*) [48 Stat. 895 (1934), 15 U. S. C. § 78n (a)]:

"It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Section 21 (*e*) [48 Stat. 899 (1934), as amended, 15 U. S. C. § 78u (e)]:

"Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States, the district court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, * * *."

Section 27 [48 Stat. 902 (1934), as amended, 15 U. S. C. § 78aa]:

"The district courts of the United States, the district court of the United States for the District of

Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. * * *."

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REPLY BRIEF OF PETITIONER.

EDWIN D. STEEL, JR.,
3018 duPont Building,
Wilmington 41, Delaware,
Attorney for Petitioners.

MORRIS, STEEL, NICHOLS & ARSHT,
Of Counsel.

International, 236 Chestnut St., Phila. 6, Pa.

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REPLY BRIEF OF PETITIONER.

In its brief, Respondent has assumed (Res. Br. 20) that Petitioner has abandoned its contention (urged in both lower courts) that the Proxy Rules do not make it mandatory for management to solicit proxies upon stockholders' proposals merely because management desires to solicit proxies for the election of directors. This assumption is an erroneous one.

The petition squarely presents the question whether, as a matter of construction, the Proxy Rules make it mandatory for a corporation which desires to solicit proxies solely for the election of directors, likewise to solicit proxies upon proposals submitted by stockholders (Pet. 7, Question 2). The importance of a determination of this question by this Court is one of the reasons urged by Transamerica for the issuance of certiorari (Pet. 8, 10, Reasons 1 and 2).

Respondent's suggestion that this question is unsubstantial is likewise unjustified (Res. Br. 20). Rules X-14A-7 and X-14A-2, by their terms, are applicable only when management intends to act upon a stockholder's proposal under the proxies which it solicits (Pet. 3, 4). On the other hand, Item 18 of Schedule 14A prescribes what must be included in a proxy statement when management does not intend to act upon a stockholder's proposal under the proxies which it solicits (Pet. 4). Implicit in these Rules is the right of management to determine whether, in soliciting proxies for the election of directors, it will also solicit proxies with respect to stockholders' proposals, or whether it will refrain from doing so and leave stockholders to their solicitation remedy under Rule X-14A-6.

Beyond this, Respondent's brief requires no comment.

For the reasons stated in the petition, this Court, it is believed, is clearly warranted in granting the review which petitioner seeks.

Respectfully submitted,

EDWIN D. STEEL, JR.,
3018 duPont Building,
Wilmington 41, Delaware,
Attorney for Petitioners.

MORRIS, STEEL, NICHOLS & ARSHT,
Of Counsel.